FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 641

J. D. ADAMS MANUFACTURING COMPANY - Appellant,

v.

WILLIAM STOREN, as Chief Administrative Officer of the Department of Treasury of the State of Indiana,

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

PAUL V. McNUTT, WILLIAM STOREN, FLOYD E. WILLIAMSON, as and Constituting the Board of Department of Treasury of the State of Indiana,

PHILIP LUTZ, JR., as Attorney General of the State of Indiana - - - - - - - - - - - - Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

Wm. B. Burford Printing Co., Indianapolis

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APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

SUMMARY OF ARGUMENT

In the consideration of this case, I think it is of the utmost importance that it be kept in mind—

First, that appellant is a corporation domestic to Indiana engaged in the business of manufacturing, whose sole factory is in Indianapolis, Indiana, and that the gross

receipts, insofar as the same are involved in this appeal, were all received at its Home Office in Indiana and that its shipments were from its factory in said State and upon orders taken subject to the approval of the Home Office in Indiana.

R., 24 and 25; also R., 26, 27 and 28.

Second, that the tax is a general tax not only from the standpoint of the taxpayer, but also from the standpoint of the gross receipts which are used as a measure of the tax.

Section 2 of Act, Appellees' Brief, page 4, also page 84;
Title of Act, page 83, of Appellees' Brief;
Section 1 (f) of Act, Appellees' Brief, page 83.

Third, that while the tax is nominally in addition to other taxes, it is in fact in lieu of the general property levy to the extent of the amount of the tax, and that the question now under consideration is limited to the application of the tax to appellant under the facts already stated.

APPELLEES' POSITION

Appellees contend that the tax under the above facts as applied to appellant is not an unconstitutional burden upon interstate commerce for the following reasons—

1. It is a privilege tax levied upon the receipt of gross income in Indiana, the domicilliary state of appellant, which has been held to be a taxable event and is designed simply to reach appellant's fair share of government expense.

2. It is a general tax levied upon all residents of the State who receive gross income within the State and is in lieu *to the extent of the tax* of the general property levy.

3. That the tax is not upon interstate commerce as such, nor as such upon the receipts derived from inter-

state commerce; that the act taxed is local in character and the principle upon which it rests does not upon the same basis authorize the subjection of the commerce to cumulative burdens.

The receipt of income by a resident of the taxing sovereignty is a taxable event.

Maguire v. Trefry, 253 U. S. 12;
Lawrence v. State Board of Tax Commissioners, 286 U. S. 276;
State of New York, ex rel. Cohn v. Graves, 300 U. S. 308.

As has already been pointed out, the receipt of income by a resident of a taxing sovereignty is a taxable event, quoting from the case of State of New York, ex rel. Cohn v. Graves, 300 U. S. 308 at page 312—

> "That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicile itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendent right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government."

Persons and corporations engaged in interstate commerce are not immune from this responsibility.

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens even though it increases the cost of doing business."
>
> Western Live Stock, etc., v. Bureau of Revenue, et al., etc., United States Supreme Court, No. 322, October Term, 1937, Decided February 28, 1938.

"Even interstate business must pay its way."

Postal Telegraph Cable Company v. Richmond, 249 U. S. 252 at p. 259.

The problem as to when a state tax is a burden upon interstate commerce and when it is only the imposition of the fair share of the taxpayer's just burden of state government is a practical one and must be determined upon a practical consideration of the way the tax operates.

"Experience has taught that the opposing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce, are not capable of reconciliation by resort to the syllogism. Practical rather than logical distinctions must be sought."

Western Live Stock, etc., v. Bureau of Revenue, et al., etc., *supra.*

Thus the entire scheme of Indiana's tax system must be taken into consideration to determine whether in fact the tax under discussion is an illegal burden on interstate commerce. Before going into this subject in detail, however, it is desirable to consider some specific cases in which the tax has been considered not to be an illegal burden.

I.

Persons and corporations engaged in interstate commerce are subject to a property tax on the instruments employed in the commerce.

Cleveland, etc., Ry. Co. v. Backus, 154 U. S. 439;
Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18;
Adams Express Co. v. Ohio, 165 U. S. 194.

This is so well settled as not to merit further discussion, although it is at once apparent that even such taxes add to the expense of carrying on the interstate commerce and to that extent burden it. It is sustained upon the premise that "even interstate business must pay its way" and that the tax thus imposed subjects those engaged in interstate commerce to only the usual and ordinary governmental burdens as apply equally to those engaged in intrastate business. It would seem, in passing, that any scheme of taxation whereby this same result would be reached would likewise be valid. It is not the form but the substance which speaks in such a case as this.

II.

A State may not burden interstate commerce by taxing such commerce, but it may measure the value of property of a corporation engaged in interstate commerce within the State by gross receipts, and impose a tax thereon if the same is in lieu of all taxes upon the property.

U. S. Express Co. v. Minnesota, 223 U. S. 335;
Cudahy Packing Co. v. Minnesota, 246 U. S. 450 at p. 453;
Maine v. Grand Trunk Railway Co., 142 U. S. 217.

The theory upon which the court proceeded in the above cases was undoubtedly a further development of the proposition well established by the authorities that the ordinary taxation of the *property* of a person or corporation used by such person or corporation in interstate commerce is not an unlawful burden on interstate commerce. The theory accepted doctrinely the right to use gross receipts from interstate commerce as a measure provided such tax was in lieu of *all* property taxes. An examination of the laws under consideration reveals the

fact that in some of the cases the tax measured by gross receipts was not entirely in lieu of all property taxes, but that was the doctrine upon which the decisions rested. The point is well illustrated by the language of the court in the case of Cudahy Packing Co. v. Minnesota, *supra,* where the court said on page 454—

> "The question of the nature and effect of taxes more or less like this has been repeatedly considered in this court. In some instances its solution has been attended with considerable difficulty, for while the controlling general principles have long been well settled it has not been easy to apply them to all the varying situations presented. A short reference to two recent cases in which the earlier decisions were reviewed will leave little to be said in solving the question here. We refer to *Meyer* v. *Wells Fargo & Co.,* 223 U. S. 298, and *United States Express Co.* v. *Minnesota,* 223 U. S. 335, both decided on the same day. The former involved a tax in Oklahoma of a stated per cent of the gross receipts of an express company doing both a local and an interstate business in that State. The statute called the tax a 'gross revenue tax' and declared that it was to be 'in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets' of the company. We held that the tax could not be sustained as a tax on the gross earnings, they being partly derived from interstate commerce, and also held that it could not be regarded as a property tax, because, as the statute disclosed, all the property of the company in the State was to be reached and valued in another way. The other case involved a tax in Minnesota of a designated per cent of the gross earnings of an express company from business done in that State, the business being partly local and

partly interstate commerce. The statute declared that the tax was to be in lieu of other taxes on the company's property, and the state court held that it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as a measure of the value of the property for taxing purposes. We accepted and gave effect to that holding, not as being conclusive on us, but on the grounds that the property from which the earnings were derived was not to be otherwise taxed, that the tax was part of a system intended to reach the full value of the company's property in the State as reflected by the gross earnings, and that the amount of the tax did not appear to be in excess of what would be legitimate as an ordinary tax on the property, valued with reference to its use as part of a going concern. The case dealing with the Oklahoma tax was distinguished by pointing out that the tax could not be regarded as a property tax, because it was to be in addition to another tax reaching the full value of the company's property in the State."

As applied to a case such as was then under consideration, the *in lieu of all property taxes doctrine* is doubtless correct, since it applied only to a specially selected class and to the extent that it was in lieu of less than *all* property taxes, it was in *addition* to the ordinary general property tax. This is illustrated by the graph on page 92 of appellees' brief termed "The Crew Levick Case," considered in connection with the second graph entitled "Gross Receipts in Lieu of Property Tax Cases." The burden of the excise tax which is not in lieu of *all* property taxes of the particular taxpayer, is because it applies to a special group only. Where, as in this case, the excise tax is general to the same degree at least as the property tax, the fact that it is in lieu of less than *all*

of the property tax of a given taxpayer does not make it a burden. This is illustrated by the graph on page 92 of appellees' brief termed "The Adams Case."

III.

Local taxes measured by gross receipts from interstate commerce are not necessarily invalid by reason of that fact. It is only such taxes as have placed on the commerce burdens which are capable in point of substance of being imposed or added to with equal right by every state which the commerce touches, merely because interstate commerce is being done, it is only such taxes as those that are invalid.

Western Live Stock, etc., v. Bureau of Revenue, et al., etc., *supra.*

The tax imposed by the Indiana Act is not such a burden as, with equal right, every state which the commerce touches may impose merely because interstate commerce is being done. As in the case of Western Live Stock, etc., v. Bureau of Revenue, et al., etc., *supra,* all of the events upon which the tax is conditioned occur in Indiana. It cannot with equal right be duplicated in any other state. In this regard, it is wholly different from attempts at the taxation of gross receipts of railroad companies engaged in interstate transportation. In such cases, there is the possibility of cumulative taxation in every state which the commerce touches. For example, a railroad company whose gross receipts are derived from interstate transportation, if taxed on those gross receipts in one state, may with equal reason, be taxed thereon in every state through which it passes. The effect of this would be to subject the commerce thus represented to multiple taxes, and it would make no difference if, as to the tax imposed in any given state, the burden was no greater than was imposed on intrastate commerce within

that state, the taxation in the other states would create a discrimination and therefore a burden. It was therefore proper and right that Indiana should exclude receipts from that type of interstate commerce from consideration in fixing the tax liability.

See Regulation 140, R., p. 121.

Incidentally, this regulation disposes of most of the authorities cited by appellants as authorities.

IV.

The tax here involved is not of a type which this court in a line of decisions unbroken for more than half a century has held to be an unconstitutional burden on interstate commerce.

Appellant states the reverse of this proposition on page 10 of his brief and seeks to support it with fourteen citations of authorities. But all of the authorities cited, except two, are cases in which the levy was against gross receipts of transportation and communication companies which Indiana does not in fact tax. Of the remaining two, one was the case of a net income tax, which was upheld by the court, and the other, *Crew Levick Company* v. *Pennsylvania,* 245 U. S. 292, was a case wherein a special class only was subjected to the tax and the same was in addition to property taxes resulting, therefore, in a manifest discrimination.

The principle for which we are here contending was recognized by the court in its most recent decision on the subject—*Western Live Stock, etc.,* v. *Bureau of Revenue, et al., etc., supra.*

V.

The tax is one of general application which is neither aimed at nor discriminates against interstate commerce.

The commerce clause does not exempt appellant from such a tax.

A determined effort is made by appellant to show that the tax involved in this case is not of general application, but, we think, without avail. It is, of course, not universal, but we know of no tax which is universal in its application. The Indiana tax, however, is general in its application as that term is ordinarily used. It reaches, primarily, all persons, firms and corporations domiciled within the State of Indiana or who receive gross income from sources within the State. We find appellant objecting to the $1,000.00 exemption as contained in the act. But appellant, as well as all others, are beneficiaries of that exemption. He objects to the exemption of non-profit associations. It is not unusual to find similar exemptions in all general tax statutes. In fact, generally speaking, the same class is exempted from the Federal Net Income Tax. U. S. C. A. Tit. 26, Section 103. Apparently they would not find any objection to the generality of a net income tax with such exemptions or that the generality of such a tax is any the less general in the legal sense because the exemptions are made. He objects because in the case of banks and trust companies and similar institutions gross earnings are used as the measure. In such a case, manifestly any other method would be grossly unfair. The deposit receipt of a bank is in no sense comparable with the gross receipts of a manufacturing establishment, but gross earnings of such an institution are comparable. He objects because insurance companies which already pay the State a tax of more than one per cent on premiums are exempted. Why not? They already pay a gross receipts tax in excess of the present levy on appellant. We insist that the tax here in question clearly meets all the reasonable requirements of a tax of general application. It follows that it is neither aimed at interstate commerce nor does it discriminate against it.

With that in mind, we desire to call the court's attention to the language of Mr. Justice Stone, concurred in by Mr. Justice Holmes and Mr. Justice Brandeis, in his concurring opinion in Helson and Randolph, Co-partners, v. Kentucky, 279 U. S. 245, at page 253—

> "Nor can I find any practical justification for this distinction or for an interpretation of the commerce clause which would relieve those engaged in interstate commeree from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, which is neither aimed at nor discriminates against interstate commerce. It 'affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed.' *Delaware Railroad Tax,* 18 Wall. 206, 232."

CONCLUSION

The Act in question was designed and intended to spread the tax base in Indiana to the end that the burden on tangible property might be reduced. This purpose has been accomplished. As a result of this tax the burden on property in Indiana has been reduced from an average of one hundred forty million per year for the four years preceding 1933 to an average of ninety-five million per year for the four years since 1933. About twenty million per year in revenue is now produced from the tax on the privilege of receiving gross income. To that extent this tax is in lieu of a general property tax.

It is general in its application, as general in its scope as the general property tax. It is neither aimed at nor discriminates against interstate commerce.

"It affects commerce among the states and impedes the transit of persons and property from one state to another just in the same way, and in no other, that taxation of any kind necessarily increases" the cost of doing business. Its validity should therefore be sustained.

Respectfully submitted,

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